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Ignoring the Technicality's Temptation: Interpreting the Citizenship of a Foreign Official under the Foreign Corrupt Practices Act

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IGNORING THE TECHNICALITY'S TEMPTATION: INTERPRETING THE CITIZENSHIP OF A FOREIGN OFFICIAL UNDER THE FOREIGN CORRUPT PRACTICES ACT

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The Foreign Corrupt Practices Act ("FCPA") prohibits bribing "foreign officials," but it does not define the word "foreign" or give any guidance to what citizenship the official must have to fall under the FCPA. Adding to the difficulty when defining "foreign," the recent rise in prosecutions and increased FCPA case law has failed to produce an obvious answer as to how a court should address these issues. This makes it harder for businesses to comply with the FCPA or, in the alternative, obtain favorable deferred prosecution agreements. This Comment argues that, while the FCPA excludes those with U.S. citizenship from being "foreign officials" to protect defendants from an ambiguous criminal statute, businesses should structure compliance programs to treat "foreign officials" as including those with U.S. citizenship. Section I of this Comment traces the evolution of the United States' anti-bribery obligations. Section II analyzes courts' divergent readings of the FCPA and the problem this creates for interpreting whether "foreign" implies that the actor must be a non-U.S. citizen to constitute a "foreign official." Section III identifies how a court would use past approaches to interpret the term "foreign" to include

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actors with U.S. citizenship, but ultimately would adopt a defendant's narrow definition under the rule of lenity. It then argues that businesses should consider this loophole nonexistent for compliance program purposes. The Conclusion places this issue within the current debate over narrowing the FCPA's terms, determining that it shows the need for statutory clarification and reform to better allow businesses to comply with the law.

INTRODUCTION

On paper, the United States criminalizes bribing "foreign officials,"[1] but despite clear evidence, some instances of bribery have escaped prosecution.[2] In June 2012, R. Allen Stanford stood trial for running an investment fraud scheme.[3] At trial, a witness recounted that Stanford bribed an Antiguan bank regulator, Leroy King, as part of his actions to

1. 15 U.S.C. § 78dd-1 (2012).

2. *See, e.g.*, Richard L. Cassin, *Stanford's Antigua Bribes: Why No FCPA Charges*, THE FCPA BLOG (June 15, 2012), http://www.fcpablog.com/blog/2012/6/15/stanfords-antigua-bribes-why-no-fcpa-charges.html (noting that the government did not pursue FCPA charges against Allen Stanford though there was clear testimony of bribery at his trial).

3. *See id.* (explaining that Stanford stood trial for charges of fraud and conspiracy for fake certificates of deposit sold to investors); *see also* Press Release, Dep't of Justice, Allen Stanford Sentenced to 110 Years in Prison for Orchestrating $7 Billion Investment Fraud Scheme (June 14, 2012) *available at*, http://www.justice.gov/opa/pr/2012/June/12-crm-756.html.

support the Ponzi scheme.[4] Although King may have qualified under the Foreign Corrupt Practices Act ("FCPA") as a "foreign official" because he was an instrumentality of another state, U.S. officials chose not to charge Stanford with a FCPA violation.[5] Richard Cassin, a FCPA expert, inferred that Stanford escaped charges because King maintained dual citizenship with the United States and Antigua and Barbuda, West Indies.[6]

This situation presents particular difficulty for businesses that operate overseas because unpredictable application of the FCPA hinders compliance with the law.[7] The Stanford case could indicate relaxed FCPA enforcement by the United States,[8] or it could mean that the United States interprets the FCPA's "foreign official" to mean a non-U.S. citizen.[9] Although a business could operate under the assumption that the United States interprets "foreign official" to include only non-U.S. citizens, the business would do so at the risk of preparing an inadequate compliance program and potentially violating the statute.[10]

When looking for a citizenship requirement, there is little tangible legal guidance for businesses to follow.[11] The FCPA specifically criminalizes the bribery of "foreign officials," making it unlawful for a business and its

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4. *See* Cassin, *supra* note 2 (recounting testimony that Stanford bribed Antiguan bank regulators with a Swiss slush fund to keep his Ponzi scheme afloat).

5. *See id.*

6. *See id.* (conjecturing that the federal government withheld charges due, in part, to the potential for costly appeals over the question of whether a "foreign official" is a non-citizen when the "foreign official" had dual U.S. citizenship). The government may also have been deterred from filing charges because Stanford already faced fraud and conspiracy charges that carried lengthy prison terms. *Id.*

7. *See* Catherine Dunn, *Compliance Hinges on the Tricky Definition of 'Foreign Official,'* LAW.COM (Aug. 27, 2012), http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202568942016&FCPA_Compliance_Hinges_on_the_Tricky_Definition_of_Foreign_Official (noting the importance of clear statutory terms, which enable businesses to create effective compliance programs and follow business practices that lead to fewer violations).

8. *See* Cassin, *supra* note 2 (noting that the Department of Justice ("DOJ") chose not to bring charges against Stanford in the face of clear indication of bribery).

9. *See id.* (proposing that the DOJ withheld charges against Stanford because of a lack of authority and case law supporting that a "foreign official" includes a U.S. citizen).

10. *See* Dunn, *supra* note 7 (explaining that businesses need clarity to create effective and comprehensive compliance programs); Dep't of Justice Criminal Div. & SEC Enforcement Div., *A Resource Guide to the Foreign Corrupt Practices Act*, DEP'T OF JUSTICE (Nov. 14, 2012), at 71 http://www.justice.gov/criminal/fraud/fcpa/guide.pdf (stating that robust compliance programs help employees avoid FCPA violations and help obtain non-prosecution agreements, or deferred prosecution agreements from the DOJ and the Securities and Exchange Commission ("SEC"), potentially reducing fines and punishment for the business).

11. *See* Cassin, *supra* note 2 (noting the lack of precedent to suggest that the term "foreign official" includes U.S. citizens and the uncertainty it created for the DOJ).

agents to offer payment, promise to pay, or authorize the payment of anything of value to any foreign official or foreign political party.[12] Additionally, the payments must be made for purposes of influencing any act or decision of the official or political party to obtain or retain business of the payor.[13] The statute defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof" without specifically defining "foreign" to mean a non-U.S. citizen.[14] While cases have analyzed the meaning of other aspects of the statutory definition of "foreign official,"[15] courts have yet to decide on the specific citizenship requirements of a "foreign official," leaving businesses without a concrete answer as to what constitutes a FCPA violation.[16] These business are left with high-stakes guesswork as to whether a court would decide that "foreign official" under the FCPA implies that the actor be a non-U.S. citizen.[17]

This Comment argues that the FCPA contains a loophole that excludes those with U.S. citizenship from being considered "foreign officials" to protect the defendant from statutory ambiguity, but that businesses should structure compliance programs to treat the term "foreign officials" as including those with U.S. citizenship. Section I traces the evolution of the United States' anti-bribery commitments. Section II analyzes courts' divergent readings of the FCPA and the problem it creates in determining whether "foreign" implies that the actor must be a non-U.S. citizen to constitute a "foreign official." Section III identifies how a court could use past approaches to interpret the term "foreign" to include actors with U.S. citizenship, but ultimately concludes that courts should follow the rule of lenity—a method of statutory interpretation that reads ambiguous criminal statutes in favor of defendants. It then argues that businesses should ignore this interpretation for compliance program purposes. Finally, this Comment places this issue in the context of the present debate over whether to narrow the FCPA's terms, concluding that statutory clarity is needed to better allow businesses to comply with the statute.

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12. 15 U.S.C. § 78dd-1(a) ("It shall be unlawful . . . [to] influenc[e] any act or decision of [a] foreign official in his official capacity, (ii) induc[e] [a] foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) secur[e] any improper advantage . . . .").

13. *Id.* ("[The payment must be made] to assist such issuer in obtaining or retaining business for or with, or directing business to, any person . . . .").

14. *Id.* § 78dd-1(f)(1)(A).

15. *See, e.g.*, United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011) (interpreting the "instrumentality" prong of "foreign official").

16. *See* Cassin, *supra* note 2 (noting that a court has never faced an instance where the "foreign official" in question had citizenship other than that of another country).

17. *See* Dunn, *supra* note 7 (describing the risks to businesses caused by ineffective compliance programs).

I. THE EVOLUTION OF THE UNITED STATES' ANTI-BRIBERY OBLIGATIONS AND RECENT COURT DECISIONS THAT HAVE INTERPRETED THE FCPA

This Section sets out the United States' domestic and international anti-bribery obligations, and then reviews recent case law interpreting the FCPA as a means to understanding the different possible ways to approach the interpretation of "foreign."

A. The United States' Domestic Anti-Bribery Obligations

The United States enacted the FCPA in 1977 to combat bribery.[18] The FCPA does not cover all types of commercial bribery, but rather prohibits the bribery of "foreign officials," foreign political parties, and candidates for a foreign political party.[19] Specifically, the FCPA defines "foreign officials" to include officers and agents of a foreign government or that government's agency, department, or instrumentality.

Substantively, the FCPA criminalizes active bribery as opposed to passive bribery—meaning that it is illegal to give actively a bribe, but legal to receive a bribe.[20] The FCPA covers parties who issue certain classes of securities, and it includes the issuer's "officer, director, employee, or agent."[21] The FCPA prohibits a covered party, its employees, or agents from offering, paying, promising to pay, or authorizing payment of money, gift, or anything of value to a "foreign official" or political party.[22] Additionally, successful prosecution under the FCPA requires a showing that the bribes are intended to either influence an entity or induce an entity to (1) use its influence to secure an improper advantage, (2) violate its lawful duty, or (3) influence its decisions made in an official capacity.[23]

Over the years, the FCPA has evolved to meet various cultural and international attitude shifts in determining what behavior is acceptable.[24]

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18. *See* S. REP. No. 95-114, at 3–4 (1977) (Conf. Rep) (noting that the FCPA was enacted to combat foreign bribery, partly in response to domestic and foreign bribery incidents that exposed the U.S. companies engaging in widespread bribery, and partly in response to a growing moral imperative to level the playing field in international business by attacking bribery overseas).

19. 15 U.S.C. § 78dd-1(a)(1)–(3).

20. *See generally id.* § 78dd-1 (addressing the bribe giver, rather than the bribe receiver who acts as a statutory element as the "foreign official").

21. *Id.* § 78dd-1(g)(1).

22. *Id.*

23. *See id.* § 78dd-1(a)(1)-(3).

24. *See* Eric J. Smith, Comment, *Resolving Ambiguity in the FCPA Through Compliance with the OECD Convention on Bribery of Foreign Public Officials*, 27 MD. J. INT'L L. 377, 392–93 (2012) (explaining that amendments made to the FCPA were in response to the United States' international obligations under the Organisation for Economic Co-operation and Development's Anti-Bribery Convention).

Congress enacted the FCPA in 1977 as a response to unethical corporate behavior, particularly the SEC's Watergate-era investigations and discovery of corporate slush funds used to bribe foreign government officials for favorable business procurement.[25] Congress deemed criminalizing this behavior necessary to stopping the unethical conduct that tarnished the image of American businesses abroad and to restore integrity and public confidence to the American business system.[26]

Congress amended the FCPA twice since its enactment.[27] The 1988 amendment, part of the Omnibus Trade and Competitiveness Act, changed the FCPA in two major ways.[28] First, Congress altered the scienter requirement for third-party bribes.[29] Second, Congress clarified the facilitation payments exception,[30] while adding two more defenses corporations could use to protect themselves against liability.[31] Congress intended these changes to lessen the obstacles on exports faced by U.S. companies, while "attempting to balance a resolute opposition to global corporate bribery with the promotion of U.S. economic interests abroad."[32] Congress next amended the FCPA in 1998 to comply with the United States' obligations under the Organisation for Economic Co-Operation and Development's ("OECD") Convention Combating Bribery of Foreign

25. *See* Pete J. Georgis, Comment, *Settling with Your Hands Tied: Why Judicial Intervention Is Needed to Curb an Expanding Interpretation of the Foreign Corrupt Practices Act*, 42 GOLDEN GATE U. L. REV. 243, 248–49 (2012) (positing that the FCPA was enacted in response to corporations' rampant unethical conduct as discovered during the Watergate era's SEC and Internal Revenue Service ("IRS") investigations that uncovered corporate slush funds used to gain overseas business agreements).

26. *See id.* at 250 (quoting then Treasury Secretary W. Michael Blumenthal) ("Many U.S. firms have taken a strong stand against paying foreign bribes and are still able to compete in international trade. Unfortunately, the reputation and image of all U.S. businessmen has been tarnished by the activities of a sizeable number, but by no means a majority of American firms. A strong anti-bribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.").

27. *See* Smith, *supra* note 24, at 383–85.

28. *See* Georgis, *supra* note 25, at 252–53 (explaining that the Omnibus Trade and Competitiveness Act clarified and amended the 1977 terms to promote U.S. economic interests abroad in the wake of a growing trade deficit).

29. *See* Smith, *supra* note 24, at 381 (acknowledging that the FCPA criminalizes bribes only if the bribe giver has knowledge that the payments are made for bribing purposes).

30. *See* Georgis, *supra* note 25, at 253–54 (noting that the FCPA clarified facilitation payments to include " 'routine governmental action,' " like clerical duties).

31. *See id.* (noting that the Act permitted defenses of "reasonable and bona fide expenditures," and "legality in the host country").

32. *See id.* at 254 (relaying the Act's reasoning, as stated in the congressional findings, that corporations' concerns about the FCPA's scope should not eclipse the FCPA's original intention).

Public Officials in International Business Transactions and Related Documents ("OECD Anti-Bribery Convention").[33] In this amendment Congress broadened the "foreign official" definition to include the language "any person."[34]

B. *The United States' International Anti-Bribery Obligations*

In addition to its domestic obligations, the United States has become party to international conventions that impose anti-bribery obligations.[35] As one of the first pieces of anti-bribery legislation, the FCPA stands as a model for much of the subsequent international anti-bribery conventions, with each convention reflecting different cultural norms and anti-bribery goals.[36]

1. *OECD Convention Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*

The United States signed the OECD Anti-Bribery Convention as part of one of the first internationally binding efforts to combat bribery.[37] The text mirrors the FCPA and outlaws bribing foreign public officials.[38] This Convention does not include all countries, but rather the OECD member

33. *See id.* at 254–55 (noting the United States' obligations to conform its domestic legislation with the OECD Anti-Bribery Convention's provisions, including broadening "bribery," and the FCPA's jurisdictional scope).

34. *See* Smith, *supra* note 24, at 381 n.25 (explaining that the term "foreign official" needed new language to clarify and conform with the OECD Anti-Bribery Convention's broader scope).

35. *See Steps Taken to Implement and Enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions – United States*, ORG. FOR ECON. CO-OPERATION AND DEV. 2 (May 31, 2011), http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention /42103833.pdf [hereinafter *OECD*] (listing three international bribery conventions that the United States has joined).

36. *See* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 98–100 (2010) (describing how the United States has taken a leadership role in its domestic legislation and in leading international efforts to combat bribery as a founding member of the OECD and as a proponent of the OECD Anti-Bribery Convention).

37. *See OECD*, *supra* note 35, at 1 (noting the United States' date of instrument ratification and acceptance as December 8, 1998).

38. *Compare id.* (explaining that the FCPA is the United States' implementing legislation), *and* 15 U.S.C. § 78dd-1(f)(1)(A) (outlawing the bribing of "foreign officials"), *with Convention Combating Bribery of Foreign Public Official in International Business Transactions and Related Documents*, ORG. FOR ECON. CO-OPERATION AND DEV. 7 (2011), http://www.oecd.org/dataoecd/4/18/38028044.pdf [hereinafter *OECD Convention*] (requiring a member country to criminalize a person who intentionally offers, promises, or gives any undue advantage to a "foreign public official" in order to gain an improper business advantage through the action or inaction of the "foreign public official").

countries and any other countries that have joined the OECD Working Group on Bribery in International Business Transactions ("Working Group").[39] The OECD Anti-Bribery Convention requires its parties to enact domestic legislation and monitors countries' compliance as its enforcement mechanism.[40] Despite this seemingly relaxed enforcement procedure, the Working Group brings the parties together and successfully relies on the power of peer monitoring to ensure compliance with the document's requirements.[41] Thus, the United States has a strong incentive to comply with the document, especially because it is a founding member of the OECD.[42] Further, the Working Group reports on each country's implementation of legislation, efforts to combat bribery of foreign public officials, and compliance with the OECD Anti-Bribery Convention.[43]

2. United Nations Convention Against Corruption

Additionally, the United States is party to the United Nations Convention Against Corruption ("U.N. Corruption Convention").[44] This represents the largest international effort to combat corruption.[45] The text recognizes the harm corruption causes to the growth of democracy, the rule of law, and sustainable development of countries.[46] The U.N. Corruption Convention also deals with general forms of corruption, not limiting itself to business corruption.[47] As such, the U.N. Corruption Convention requires that parties

39. *See OECD Convention*, *supra* note 38, at 13, 19 (listing the member countries of the OECD Anti-Bribery Convention and providing that non-member countries may become parties by joining the Working Group).

40. *See id.* at 7, 11 (mandating that parties take measures to enact domestic legislation and requiring that the parties monitor their success to ensure full implementation).

41. *See id.* at 18–19 (providing for monitoring and follow-up procedures that include regular reviews, self-evaluation, and mutual evaluation and examination of specific issues concerning bribery in international business).

42. *See* Smith, *supra* note 24, at 396 (discussing how acceptance between the members and the recognition of a shared responsibility to combat bribery may have elevated the OECD Anti-Bribery Convention to the level of customary international law).

43. *See OECD Convention*, *supra* note 38, at 18–19 (requiring reports to objectively assess countries' progress in implementing the OECD Anti-Bribery Convention as a part of monitoring efforts). *See generally OECD*, *supra* note 35 (demonstrating an example of a country analysis report for the United States).

44. *See OECD*, *supra* note 35, at 2.

45. *See generally* United Nations Convention Against Corruption, Oct. 31, 2003, T.I.A.S. No. 06-1129, 2349 U.N.T.S. 41 (providing the list of parties as one hundred and sixty-one countries and the European Union).

46. *See id.* at 1, 2349 U.N.T.S. at 145.

47. *See id.* at 3, 5, 2349 U.N.T.S. at 146, 148 (emphasizing that the purpose is to prevent and fight corruption on a macro level and calling for preventative measures to address corruption broadly).

implement domestic measures in the areas of prevention, criminalization and law enforcement, international cooperation, and asset recovery.[48]

3. Inter-American Convention Against Corruption

The United States has also signed the Inter-American Convention Against Corruption ("IACAN").[49] IACAN was the first international agreement to address corruption.[50] The parties to IACAN are the member countries of the Organization of American States.[51] The agreement requires that member states cooperate for the eradication of corruption in the performance of public functions.[52] To achieve these aims and ensure compliance, IACAN calls for oversight mechanisms that rely on individual monitoring assessment and member state support.[53]

4. Agreement Establishing the Group of States Against Corruption

While not a member of the European Council, the United States signed the Agreement Establishing the Group of States Against Corruption ("GRECO") in 1998.[54] This group includes the European Council's member states and observer states.[55] The agreement covers methods of strengthening the member countries' capacity to monitor and evaluate anti-corruption measures.[56] The agreement is enforced through follow-up assessment and mutual evaluation to ensure compliance.[57]

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48. *See id.* at 5–6, 2349 U.N.T.S. at 148.

49. *See OECD*, *supra* note 35, at 2.

50. *See* Inter-American Convention Against Corruption, March 29, 1996, S. TREATY DOC. No. 105-39 (1998), at 1, 35 I.L.M. 724, 724 (1996) (noting the adoption date as 1996 and the entry date as 1997).

51. *See id.* at 3–5, 35 I.L.M. at 728–29 (defining the scope of the convention as corruption that effects state parties).

52. *See id.* at 11, 35 I.L.M. at 732 (asking parties to provide mutual assistance to carry out the recommendations and calling for member states to strengthen mechanisms to prevent, detect, eradicate, and punish corruption).

53. *See id.* at 3–4, 35 I.L.M. at 728 (emphasizing the reliance on individual monitoring and mutual support as the force used to ensure compliance, rather than the creation of penalties under IACAN).

54. *See OECD*, *supra* note 35, at 2 (listing the United States as an observer state to the Group of States Against Corruption and a signing party to GRECO).

55. *See* Comm. of Ministers, *Resolution (98)7*, COUNCIL OF EUR. (May 5, 1998) http://www.coe.int/t/dghl/monitoring/greco/documents/resolution(99)5_en.asp (listing forty-seven member states, which include six observer states and the European Council).

56. *See id.*

57. *See id.*

C. The United States' Obligations in Practice and Recent Court Decisions

In the past ten years, the U.S. government has increased its prosecution of FCPA violations.[58] This trend reflects a shift in enforcement priorities that have changed as cultural norms have shifted both domestically, to more actively enforce existing legislation, and internationally, to increase anti-corruption efforts.[59] However, while the global marketplace has changed, the United States continues to affix antiquated terms to modern business practices, which creates ambiguity in those terms' application to changed business practices.[60] The combination of increased prosecutions, evolving business structures, and ambiguous terminology is reflected in recent business case law.[61]

1. United States v. Kay

The United States Court of Appeals for the Fifth Circuit indicated that bribing a government official to reduce sales taxes and customs duties for a business entity could be illegal because it possibly falls within the "obtaining and retaining business" language of the FCPA.[62] In 2001, the United States charged Douglas Murphy and David Kay, president and vice president of American Rice, Inc., with FCPA violations after the company made improper payments to Haitian officials to lower the company's sales taxes and customs duties in Haiti.[63] In response, the defendants moved to dismiss the charges against them, arguing that the United States failed to state a claim because the payments fell outside the FCPA's scope.[64] The court considered whether the payments made to reduce taxes and duties fell

58. *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010) (announcing 2009 as the ultimate year of the FCPA's resurgence, emerging from a decade of enforcement after having been rarely enforced).

59. *See id.* at 415 (analyzing the United States' increased enforcement as a product of the need to keep pace with changing norms).

60. *See id.* at 410 (arguing that the application of "foreign official" to state-owned enterprises should be challenged in court for lack of judicial scrutiny).

61. *See id.* at 410–12 (listing enforcement actions that involve an issue with "foreign official" and highlighting the rise of case law).

62. *See* United States v. Kay, 359 F.3d 738, 756 (5th Cir. 2004) (defining the scope of the FCPA to include tax savings in the event that the bribe was intended to produce an effect to aid in "obtaining or retaining business").

63. *See id.* at 740–42.

64. *See* United States v. Kay, 200 F. Supp. 2d 681, 682 (S.D. Tex. 2002) (noting that the defendants argued that the FCPA's plain language does not prohibit the payments at issue, that the legislative history favors a narrow interpretation of the acts the FCPA intends to prohibit, that the rule of lenity resolves ambiguities in favor of the defendants, and that the FCPA does not give fair warning that the conduct at issue is illegal).

within the FCPA's requirement that payments made to "foreign officials" must be for the purpose of obtaining or retaining business.[65] The United States District Court for the Southern District of Texas granted the defendant's motion to dismiss and found that, as a matter of law, payments made to obtain favorable tax treatment are not payments to obtain or retain business.[66] On appeal, the Fifth Circuit reviewed the issue, reversed the district court, and concluded that payments made to "foreign officials" to evade unlawfully sales tax and customs duties fell within the FCPA's scope.[67] The court clarified that, to prove a FCPA violation, there must be a showing of intent that unlawful payments directed to foreign officials to reduce taxes and duties would actually improve the company's business.[68]

2. United States v. Aguilar

In *United States v. Aguilar*, the United States District Court for the Central District of California ruled that the term "instrumentality" under "foreign official" could include an employee of a state-owned enterprise, depending on the entity's characteristics.[69] The United States charged Keith Lindsey, Steve Lee, and Lindsey Manufacturing Co. with FCPA violations concerning payments made to a government-controlled electric utility company.[70] The defendants moved to dismiss on the grounds that under the FCPA, an employee of a state-owned corporation cannot be deemed a "foreign official."[71] The court denied the motion and found the electric utility company had attributes that made it an "instrumentality" under the FCPA, making the employees that received the bribes "foreign officials" for the purposes of a FCPA violation.[72]

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65. *See id.* (explaining the issue before the court as ruling on the defendant's motion to dismiss).

66. *See id.* at 686 (concluding that Congress considered and rejected language to broaden the FCPA's scope to cover the conduct at issue and thus determined that the indictment's allegations did not fall under the FCPA).

67. *See Kay*, 359 F.3d at 756 (finding that the conduct could fall within the scope of the FCPA and that the case should not be dismissed because the conduct did not fall outside the scope as a matter of law).

68. *See id.*

69. *See* United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011) (ruling that the term could include at least some state-owned enterprises and listing characteristics that would tend to place an entity under the definition).

70. *See id.* at 1109–11 (alleging that the defendants paid high-ranking employees of an electric utility company controlled by the Mexican government in order to gain an unlawful business advantage).

71. *See id.* at 1110 (asserting that the government's wholly-owned subsidiary was neither an "agency," "department," nor "instrumentality" of a foreign government).

72. *See id.* at 1116–17 (concluding that not all government wholly-owned subsidiaries are excluded from "instrumentality," and, after a fact-based examination, dismissing the defendant's motion to dismiss).

3. United States v. Carson

United States v. Carson held that "instrumentality" under "foreign official" can include an employee of a state-owned enterprise.[73] In the case, the United States indicted three named defendants for charges of FCPA violations concerning payments made to foreign, state-owned companies on behalf of their employer, Controlled Components Inc., for the purpose of obtaining or retaining business.[74] The defendants moved to dismiss the charges on grounds that the United States failed to state an offense, arguing that employees of state-owned companies never constitute "foreign officials" under the FCPA.[75] The court denied the defendants' motion and concluded after a statutory analysis that some business entities, including state-owned companies, could, on a case-by-case basis, be "foreign officials" under the "instrumentality" category.[76]

II. THE DIVERGENT APPROACHES OF FCPA STATUTORY INTERPRETATION CREATE PROBLEMS FOR COURTS ATTEMPTING TO INTERPRET "FOREIGN"

This Section analyzes the previously presented obligations and case law to demonstrate that prior instances of FCPA statutory interpretation fail to produce an obvious result as to how a court would interpret the term "foreign."

A. Prior FCPA Statutory Treatment Has Produced Differing Interpretation Approaches for FCPA Terms and Leaves Uncertain As to How a Court Would Interpret "Foreign"

This first Section analyzes the different modes of reasoning that courts have used in past interpretations, showing there is no established way that a court would interpret "foreign." To date, courts have interpreted "obtain and retain business" and "foreign official" by reading the terms

73. *See* United States v. Carson, No. SACR 09 00077 JVS, 2011 WL 5101701, at *8 (C.D. Cal. May 18, 2011) (concluding that "instrumentality" could include some business entities depending on the entity's nature and characteristics).

74. *See id.* at *1–2 (indicting the defendants for nearly five million dollars worth of bribes made on behalf of their employer, Controlled Components Inc., to various foreign, state-owned companies).

75. *See id.* (contending that state-owned companies are never "departments," "agencies," or "instrumentalities" of a foreign government and therefore could not meet the definition of "foreign official" under the FCPA).

76. *See id.* at *3–6, *8 (employing an ordinary reading of the term and considering the term in light of both the surrounding terms and the statute as a whole to reject the defendant's assertion as impermissibly narrowing the FCPA and ultimately concluding that the state-owned business could be an "instrumentality" on a fact-based analysis).

expansively.[77] In addition, courts have varied their modes of interpretation when reading the same term.[78] There are six approaches courts have used to interpret the FCPA.

1. A Court Will Start with Plain Language Readings of FCPA Terms

When interpreting a statute, a court will first look to the text for a definition.[79] If a term is not defined in the statute, the court will consider the plain and unambiguous meaning of the language as controlling.[80] Courts interpreting the FCPA start their inquiry with this mode of interpretation.[81] Generally, FCPA statutory language interpreted by a plain language reading favors broad definitions.[82]

In *Kay*, the Fifth Circuit attempted to employ a statutory interpretation of "obtaining or retaining business" by looking to the FCPA's language, but found it provided little guidance.[83] The FCPA fails to provide what constitutes "business" under the statute's prohibition of bribes paid to "obtaining or retaining business," and the court needed to articulate a scope to rule on the case's issues.[84] Without a given statutory definition, the court looked to the plain meaning of "obtaining or retaining business" for guidance.[85] In analyzing the parties' proposed dictionary definitions, the court found that each party asserted different meanings to the term, making the plain language reading debatable.[86]

Additionally in *Aguilar*, the court needed to interpret "instrumentality"

77. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 530–32 (2011) (arguing that the terms under the FCPA are being reexamined and have been enforced expansively, which has created problems).

78. *See id.* (citing instances where courts have approached "foreign official" in different manners).

79. *See, e.g.*, United States v. Kay, 359 F.3d 738, 742–43 (5th Cir. 2004) (commencing the statutory interpretation with plain language reading).

80. *See, e.g., id.* (explaining the mode of interpretation used when a statute fails to provide a definition for a term).

81. *See, e.g., id.* (employing the plain language reading as the first step of its interpretation of "obtaining or retaining business").

82. *See, e.g., id.* at 744 (refusing to determine conclusively the meaning of "obtaining or retaining business" with just the plain language meaning).

83. *See id.* at 743 (analyzing the language "obtaining or retaining business" to see if the language could encompass payments made to reduce taxes).

84. *See id.* at 743–44 (finding that the statute does not provide a defined scope of "business," meaning the court needed to interpret "business" through other modes of statutory interpretation to find whether the term encompassed bribes paid to custom officials).

85. *See id.* at 744.

86. *See id.* (concluding that each proposed definition could apply plausibly to the statute).

in the statutory definition of "foreign official."[87] The court noted that the FCPA did not supply a definition, and as such, the court looked to see if a plain language reading existed that would control the meaning.[88] The court adopted the defendant's definition, providing that an "instrumentality" could never encompass a state-owned enterprise.[89] The adoption allowed the court to avoid a full inquiry and recognize that the varying proposed definitions would not provide an unambiguous definition and that "instrumentality" would be better defined with the words surrounding it.[90]

Furthermore in *Carson*, the court started its interpretation of "instrumentality" by giving the term its ordinary meaning, but determined that plain meaning interpretation provided little help.[91] The court used dictionary definitions to gather both commonplace and legal definitions.[92] To further its argument that state-owned enterprises are included under the "instrumentality," the United States asserted a broad definition that the defendants rejected.[93] The defendants asserted that the United States' broad definition would render the proceeding terms in the statute meaningless and further pushed the court to accept that there was no settled legal definition of "instrumentality."[94]

As the reviewed dictionary definitions did not provide an unambiguous definition, the court accepted the defendant's argument and turned to other means to determine the term's meaning.[95]

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87. *See* United States v. Aguilar, 783 F. Supp 2d 1108, 1113–14 (C.D. Cal. 2011) (addressing the defendant's claims that a wholly state-owned corporation could never comprise a "foreign official" under "instrumentality").

88. *See id.* at 1113 (looking first at the statute's language to see if a given definition could address the defendants' argument, then continuing to read the term according to its plain meaning in the absence of a statutory definition).

89. *See id.* at 1113–14 (acknowledging the varying definitions of such a broad noun).

90. *See id.* (acknowledging that the definitions of "instrumentality" range from acting as an agency or means for implementation, to a subsidiary branch through which policies and functions are carried out).

91. *See* United States v. Carson, No. SACR 09 00077-JVS, 2011 WL 5101701, at *4 (C.D. Cal. May 18, 2011).

92. *See id.* at *4 (using Black's Law Dictionary, Oxford English Dictionary, and Webster's New Dictionary to gather a variety of definitions).

93. *See id.* at *3–4 (explaining that the United States argued that state-owned enterprises are included under either "agencies" or "instrumentalities" of the state as opposed to the defendants, who argued that under the statute's given definition, employees of state-owned companies can never be foreign officials).

94. *See id.* at *5 (discussing the defendants' argument against adopting a narrow reading that would render "agency" or "department" merely superfluous language in the statute).

95. *See id.* (accepting the defendant's proposal to further consider the term in the context of its preceding terms as opposed to accepting the United States' broad interpretation without further inquiry).

2. *A Court Will Most Likely Read FCPA Terms Within the Context of the Preceding Terms and in View of the FCPA As a Whole*

After a plain language reading, a court may interpret the statutory language in accordance with the statute's policy and objective and in a way that each term within the statute has an operative effect.[96] Overall, courts interjected common sense and logic to establish terms' scopes when reading the FCPA according to this principle, but resisted relying solely on this method to establish a definitive meaning.[97]

In *Kay*, the court looked to determine the scope of "obtain or retain business" and found that "assist" suggested a broader scope of "obtain or retain," but failed to concretely establish the actual scope.[98] Additionally, the court declared that the remainder of the statutory language did not clearly suggest that the business nexus element should be construed broadly or narrowly.[99] Lastly, the court looked at the FCPA's title to find that it suggested a broader interpretation.[100] Ultimately, the court found arguments for both broad and narrow readings supported by other statutory language and concluded that there was not a persuasive argument to establish the phrase's scope.[101]

Additionally, in *Carson*, the court looked to interpret "instrumentality" in the context of "agency" and "department," and within the FCPA as a whole.[102] The court first noted that "instrumentality" refers to an entity that carries out governmental functions, but is also intended to capture entities that are not "agencies" or "departments."[103] In looking to interpret the term as it would be in the vernacular, the court declared that "instrumentality"

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96. *See, e.g.*, United States v. Kay, 359 F.3d 738, 742 (5th Cir. 2004) (looking to the FCPA's policy to determine the scope of "obtaining or retaining business").

97. *See, e.g.*, *Carson*, 2011 WL 5101701, at *5 (employing a common logic-based analysis to determine the meaning of "instrumentality").

98. *See Kay*, 359 F.3d at 744–45 (deciding that the scope of "obtain or retain business" inconclusively lies somewhere between a broad interpretation and the defendant's asserted narrow reading, potentially covering the actions described in the case).

99. *See id.* at 745 (finding that the language in the "facilitating payments" exception, and the section addressing the award of new business, both offered plausible arguments for the United States and the defendants).

100. *See id.* (interpreting the title to suggest a broader reading of the terms, but finding that it fails to establish concretely a broad reading with such a generic title).

101. *See id.* at 745–46 (concluding that the statute's language does not establish a definite scope and could support a narrow or broad interpretation).

102. *See Carson*, 2011 WL 5101701, at *5 (moving the statutory interpretation beyond a plain language reading of "instrumentality" to consider it in conjunction with its surrounding terms in the FCPA).

103. *See id.* (giving "instrumentality" the same generalized definition as the two preceding terms, but ultimately differentiating its specific meaning).

would function like an "agency" or "department" through which the government conducts business without excluding a state-owned entity.[104] Furthermore, the court rejected the defendant's argument that "instrumentality" should only consist of entities that share the same characteristics as an "agency" and "department" because doing so would narrow the FCPA when it was intended to attack broadly government corruption.[105]

In *Aguilar*, the court used this principle to look at "department" and "agency" to create a list of characteristics of an "instrumentality."[106] Although the defendants argued that "instrumentality" could only encompass entities that shared characteristics of both "departments" and "agencies," the court disagreed.[107] The court dismissed this logic because sharing the characteristics of the two proceeding terms would render "instrumentality" surplus statutory language.[108] Unlike *Carson*, which looked to define "instrumentality" as capturing the entities not covered by "agency" and "department," *Aguilar* pointed to some shared characteristics that offer guidance as to what constitutes "instrumentality" and proposed a guiding list of features.[109]

3. *A Court Will Seldom Look to Other Statutes to Aid FCPA Term Interpretation*

When possible, a court may look to other statutes that contain the disputed term as a means of interpretation.[110] Courts interpreting the FCPA

104. *See id.* at *5 (reasoning similarly to the court in McBoyle v. United States, 283 U.S. 25, 51 (1931), where the court interpreted "vehicle" by asking what the word evoked in the common mind).

105. *See id.* at *5 (using the statutory intent to read "instrumentality" in light of the FCPA as a whole).

106. *See* United States v. Aguilar, 783 F. Supp. 2d 1108, 1114–15 (C.D. Cal. 2011) (responding to and accepting the defendant's argument that the court should look to similarities between "agency" and "department" to define "instrumentality," as they are entities that possess some shared characteristics).

107. *See id.* at 1115 (finding a flaw in the defendant's logic by revealing that a state-owned corporation will never be an "instrumentality" under the defendant's definition because those entities do not always necessarily share the attributes of "agencies" and "departments").

108. *See id.* (noting that if the term must share all of the other two term's characteristics, it would rob "instrumentality" of its independent meaning and violate the canon of construction that advises against reading terms to void them of meaning).

109. *See id.* (providing a non-exclusive list of factors including: the entity provides a service to the citizens, government officials appoint key officers or directors, the government finances, at least in large, part the entity through funds through governmental appropriations or revenue raising activities, the entity is granted and exercises power to exercise its functions, and the entity is widely understood to perform official functions).

110. *See, e.g.*, *Carson*, 2011 WL 5101701, at *7 (offering the FSIA as an example

hesitate to make direct comparisons between different statutes, but still analyze parties' claims that employ this mode to glean congressional intent.[111] For example, the defendants in *Carson* argued that the court should look to the Foreign Sovereign Immunities Act's ("FSIA") definition of "foreign official."[112] The defendants asserted that because the FSIA deliberately included state-owned enterprises in its definition of "instrumentality," Congress therefore did not intend to include state-owned enterprises within "foreign official" when it failed to list it expressly under the FCPA.[113] The court found little merit in that argument, limiting its analysis to terms within the same statute.[114] Rather, the court noted that because Congress included state-owned enterprises under the FSIA's definition a year before they passed the FCPA, Congress might have intended to include state-owned enterprises under the FCPA.[115]

4. *A Court May Employ the* Charming Betsy *Canon of Construction to Aid in the Interpretation of the FCPA*

Courts may employ other canons of construction to suggest a statutory term's meaning in light of other legal doctrines, such as the *Charming Betsy* canon of construction. The *Charming Betsy*[116] canon states that statutes should not be construed to violate the law of nations or an international agreement to which the United States is a party.[117] Although one court has used this method, it did so in an authoritatively and conclusive manner, giving force to this method in future interpretations.[118]

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which defines "instrumentality" and presenting it as persuasive evidence).

111. *See, e.g., id.* (refusing to apply the FSIA definitions to the FCPA definitions).

112. *See id.* (directing the court to the FSIA and asserting that Congress would have included state-owned enterprises in the "instrumentality" definition if it had intended to capture these entities under "foreign official").

113. *See id.* (relying misguidedly on the canon of construction *expressio unius est exclusio alterius*—"the express mention of one thing excludes all others"—to compare two different statutes instead of applying the canon of construction to one statute).

114. *See id.* (correcting the defendant's misguided argument by noting that the canon only has force when the items are in an associated group as to allow for an inference that excluded items were done so by choice).

115. *See id.*

116. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (requiring that, when possible, a United States statute should be construed so that its interpretation does not violate international law or conflict with a United States international agreement).

117. *See* United States v. Aguilar, 783 F. Supp. 2d 1108, 1116 (C.D. Cal. 2011) (applying the *Charming Betsy* canon of construction and reasoning that if the United States is to receive benefits of international obligations, it should honor its international agreements).

118. *See, e.g., id.* at 1118 (applying definitively the OECD Anti-Bribery Convention to aid in the FCPA's interpretation).

In *Aguilar*, the United States argued that "instrumentality" should be read in light of the United States' treaty obligations that require the criminalization of bribes to officials in state-owned enterprises.[119] The court found that Congress specifically amended the FCPA in 1998 to implement the OECD Anti-Bribery Convention and therefore accepted the United States' argument that the FCPA should be read specifically to align with that treaty.[120] Moreover, because Congress amended only "foreign official," the court saw the amendment as supporting the United States' argument that "instrumentality" could include state-owned enterprises, despite not having added "state-owned corporations" to the FCPA.[121] Therefore, the court found that the FCPA should be construed according to the United States' obligations under the OECD Anti-Bribery Convention.[122]

5. *A Court May Review the Legislative History to Aid in the Interpretation of the FCPA*

When interpreting statutory ambiguity, a court may consult the legislative history to aid interpretation.[123] In FCPA interpretation cases, courts have decided to consult and ignore legislative history to clarify ambiguity.[124] Overall, courts have differed in applying this mode of interpretation, but when using it, tend to employ it as a backdrop to interpreting other terms.[125] For example, the *Aguilar* court turned to

119. *See id.* at 1116–17 (reviewing the 1998 Amendments that changed the FCPA in response to the United States' new obligations under the OECD Anti-Bribery Convention and arguing that the term should be read in light of that convention).

120. *See id.* (applying the *Charming Betsy* canon to the term "instrumentality" and the OECD Anti-Bribery Convention).

121. *See id.* at 1117–18 (finding that the OECD Anti-Bribery Convention reflects that Congress viewed "foreign official" as already encompassing state-owned corporations because Congress did not amend "instrumentality" or "foreign official" to conform with the Convention's definition of "foreign public official," which included broadly defined public enterprises).

122. *See id.* (reasoning, in part, that "instrumentality" could include state-owned corporations under the United States' obligations to the OECD).

123. *See id.* at 1117 (citing Levi Strauss & Co. v. Abercrombie & Fitch Trading Co., 633 F.3d 1158, 1171 (9th Cir. 2011)) (permitting a review of the legislative history if there is ambiguity in the language of the statute).

124. *See id.* (employing a legislative history review, but finding it unnecessary to base the ruling on the review); United States v. Kay, 200 F. Supp. 2d 681, 684–85 (S.D. Tex. 2002) (applying the legislative history to illuminate the term's scope). *But see* United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 5101701, at *8 (C.D. Cal. May 18, 2011) (declining to pursue further statutory inquiry by analyzing the legislative history).

125. *See, e.g.*, *Aguilar*, 783 F. Supp. 2d at 1117, 1119 (deducing that the FCPA's legislative history lacked sufficient weight to establish conclusively the term's meaning).

legislative history to determine if Congress had intended to include state-owned corporations as an "instrumentality" under "foreign official."[126] After weighing arguments over whether the term included or excluded state-owned enterprises, the court concluded that the legislative history was inconclusive.[127] In response, the court circulated a hypothetical to the parties, ultimately deeming from the answers that Congress would not have viewed the specific case beyond the FCPA's reach just because the official was a state-owned corporation.[128]

In contrast to *Aguilar*, the court in *Carson* found it unnecessary to review the legislative history to determine the definition of "instrumentality."[129] The court argued that a review of legislative history is only necessary when the statutory language is ambiguous and within an incoherent statutory scheme.[130] As the court had already determined that "instrumentality" was unambiguous and within a consistent and coherent scheme, the court declined to address the parties' legislative history arguments.[131]

In *Kay*, the district court looked to the legislative history to determine the scope of "obtain or retain business."[132] The court consulted the 1977, 1988, and 1998 committee reports.[133] From this inquiry, the court found that Congress declined to amend the "obtain or retain" language to broaden the original definition's scope in both 1988 and 1998.[134] As such, the 95th Congress's intent controls when determining the language's scope.[135] With this in mind, the court determined that the payments made to reduce taxes and customs duties fell outside of the scope of "obtain or retain business"

126. *See id.* at 1117–18 (looking to the 1976 Senate bill, the 1977 House and Senate bills, and the 1988 and 1998 amendments to help clarify the definition).

127. *See id.* at 1119.

128. *See id.* at 1119–20 (proposing a hypothetical corporation and bribery incident, asking each side to apply its arguments to the new set of facts, and ultimately concluding that Congress would not have wanted to exclude the bribery from the FCPA's scope on a language technicality).

129. *See Carson*, 2011 WL 5101701, at *8.

130. *See id.* (citing Schindler Elevator Corp. v. United States, 131 S. Ct. 1885 (2011)).

131. *See id.* (declaring that previous determinations are sufficient for understanding "instrumentality" without looking further to the legislative history).

132. *See* United States v. Kay, 200 F. Supp. 2d 681, 683–84 (S.D. Tex. 2002) (continuing the statutory inquiry with a review of the legislative history after failing to concretely establish a definition by looking at the term's language).

133. *See id.* at 683–87 (listing the potential instances that Congress may have considered the term's language and gathering reports from each time Congress wrote or amended the FCPA).

134. *See id.* at 685–87 (reasoning that by declining to amend the term, the later Congresses accepted the 95th Congress's scope).

135. *See id.* at 686–87 (narrowing the range of pertinent legislative history to the time when Congress actively debated the term).

because Congress had rejected proposed bills that would have expressly broadened the FCPA's prohibited activities.[136]

6. A Court May Consider Applying the Rule of Lenity

When addressing statutory ambiguity, the defendant may argue that the court should apply the statutory construction, rule of lenity, to interpret the term in favor of the defendant if doubts about the meaning remain.[137] A court will interpret a term like this when the term's meaning proves so questionable to protect defendants who could have fairly believed their asserted definition.[138] Generally, courts have resisted applying the rule of lenity to the FCPA, as they had previously found its terms to have more than one plausible definition.[139] In *Kay*, the district court declined to apply the rule of lenity because it determined that the statue was not ambiguous.[140] If there was no ambiguity, the court determined that there was no reason to interpret the statute in the defendant's favor to avoid unfairness.[141] In *Carson*, the court declined to apply the rule of lenity because it did not find that there were two equally plausible and applicable definitions of the term "instrumentality."[142]

B. Prior FCPA Statutory Treatment Fails to Produce an Obvious Resolution as Applied to the Term "Foreign"

This Section applies the different modes of interpretation to the term "foreign" to establish citizenship requirements. The FCPA is ambiguous because the plain meaning of the word "foreign" conflicts with the definition of the word "official," which broadly refers to "any officer or employee."[143] A court could adopt the plain language meaning of "foreign," narrowly construing the term to exclude U.S. citizens from constituting "foreign officials" under the FCPA.[144] Conversely, a court

136. *See id.* at 684 (applying the legislative history to illuminate the term's scope).

137. *See id.* at 686–87.

138. *See id.* (explaining that the rule of lenity applies to protect a defendant from a lack of fair warning of a term's meaning).

139. *See id.* at 686–87.

140. *See id.* (finding that the statutory scheme clearly allows for facilitation payments).

141. *See id.* (resisting the rule's application because the defendant could fairly interpret "obtain or retain business").

142. *See* United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 5101701, at *5 (C.D. Cal. May 18, 2011) (construing the rule of lenity narrowly to apply to instances of true statutory ambiguity).

143. 15 U.S.C. § 78dd-1(f)(1)(A).

144. *See* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 439 (Compact ed. 2011) ("a person or thing from a foreign country"). A narrow reading of the definition would interpret "foreign" as a person from another country, presumably excluding U.S.

could broadly construe the term's definition to include U.S. citizens under the word "any" provided in the statutory definition.[145] The use of court's past interpretation methods to interpret other FCPA terms creates varying results when applied to the interpretation of "foreign."

1. A Plain Language Reading Fails to Establish a Concrete Reading of "Foreign"

In instances of statutory interpretation, a court starts its inquiry with a term's plain and unambiguous statutory language.[146] As applied to "foreign official," the FCPA defines the term "foreign official," but does not provide a specific definition of "foreign" that references citizenship.[147]

Without a clear statutory definition, a court would give the term its ordinary plain language reading, taking into consideration the statute's policy objectives.[148] In past FCPA interpretation cases, courts have used both English language dictionaries and legal dictionaries to aid in the interpretation.[149] Definitions drawn from some English language dictionaries point to "foreign" as an adjective that describes a person or thing that belongs to another country.[150] Additionally, a review of major legal dictionaries offers similar differing definitions.[151] Neither set clarifies the definition, failing to establish concretely a coherent reading of "foreign."[152]

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citizens.

145. *See generally* 15 U.S.C. § 78dd-1 (focusing on "any officer or employee" to interpret "foreign official" broadly).

146. *See, e.g.*, United States v. Kay, 359 F.3d 738, 742 (5th Cir. 2004) (commencing its interpretation inquiry by looking at the given language in the statute for a definition or meaning).

147. *See* 15 U.S.C. § 78dd-1(f)(1)(A) (defining the term "foreign official" as "any officer or employee of a foreign government," without definitively answering whether the "foreign official," as a person, must be non-U.S. citizen).

148. *Cf. Kay*, 359 F.3d at 742 (continuing the statutory interpretation by looking at the plain language reading and taking into account the statute's policy objective in response to the FCPA's failure to define the business nexus's scope).

149. *See id.* at 744 (citing Webster's Encyclopedic Unabridged Dictionary); United States v. Aguilar, 783 F. Supp. 2d 1108, 1113 (C.D. Cal. 2011) (citing Black's Law Dictionary).

150. *See, e.g.*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY 490 (11th ed. 2007) (offering definitions ranging from "not being within the jurisdiction of a political unit" and "situated outside a place or country" to "born in, belonging to, or characteristic of some place or country other than the one under consideration").

151. *Compare* BLACK'S LAW DICTIONARY 719–20 (9th ed. 2009) ("of or relating to another country"), *with* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 439 (Compact ed. 2011) ("a person or thing from a foreign country"), *and* BARRON'S LAW DICTIONARY 223 (6th ed. 2010) ("belonging to another country or nation").

152. *Cf. Kay*, 359 F.3d at 744–46.

The plain language reading of the term "foreign" is ambiguous as used in "foreign official."[153] A court would declare the term ambiguous because the term can be read both expansively to include all people that meet the required elements of the "foreign official" definition, and narrowly to exclude those that meet the elements, but have U.S. citizenship.[154] Additionally, after consulting the dictionary definitions under a plain language reading, a court would find that the definitions fail to establish concretely that a "foreign official" implies that the person must be a non-U.S. citizen.[155] The varying definitions are similar to the definitions in *Kay*, where the plausible definitions varied too much in scope to assign definitively one to the term.[156] As the court in *Kay* found an ambiguous definition, a court would find that "foreign" is still ambiguous after a plain language reading.[157]

2. *"Foreign," Read in the Context of the Proceeding Language and the FCPA as a Whole, Does Not Conclusively Establish a Definition of "Foreign"*

A court would find that when looking to preceding terms and in view of the FCPA as a whole, the readings offer arguments for both an expansive and narrow view of "foreign."[158] First, "foreign" must be read in accordance with "official," much like the term "instrumentality" was read according to "department" and "agency" in the *Aguilar* case.[159] When

153. *Cf. Aguilar*, 783 F. Supp at 1113–15 (establishing the plain language reading was inconclusive for "foreign official"); *Kay*, 359 F.3d at 742 (finding the plain language reading insufficient for "obtaining or retaining business").

154. *See* 15 U.S.C.A § 78dd-1(f)(1)(A) ("any officer or employee" allows for a broad interpretation); *id.* § 78dd-1(a)(1)(A)(i) ("*foreign* official" allows for a much narrower interpretation) (emphasis added).

155. *See, e.g.*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY 490 (listing multiple plausible definitions that can each alter the statutory meaning of "foreign" to either "not being within the jurisdiction of a political unit" or "born in, belonging to, or characteristic of some place or country other than the one under consideration").

156. *Compare Kay*, 359 F.3d at 744 (declaring the definition of "business" as a volume of trade and the purchasing or sale of goods in order to make a profit as too broad to assume a concrete definition), *with* BLACK'S LAW DICTIONARY 719–20 (9th ed. 2009) ("of or relating to another country"), *and* BARRON'S LAW DICTIONARY 223 (6th ed. 2010) ("belonging to another country or nation").

157. *Compare Aguilar*, 783 F. Supp. 2d at 1115–17 (finding the definitions differed to such an extent that the court adopted the defendant's definition for simplicity's sake to further analyze it using other interpretive means), *and Kay*, 359 F.3d at 742, *with* MERRIAM-WEBSTER COLLEGIATE DICTIONARY 490 ("not being within the jurisdiction of a political unit"), *and* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 439 (Compact ed. 2011) ("a person or thing from a foreign country").

158. *See Kay*, 359 F.3d at 742 (continuing its statutory inquiry of "to obtain or retain business" with the surrounding terms and in light of the FCPA's title and purpose).

159. *Cf. Aguilar*, 783 F. Supp. at 1113–14 (reading "instrumentality" in light of the

reading "foreign" in relation to "official," it can be interpreted as either the person who is foreign or the position within the foreign government.[160] Similarly, the term's definition as a whole supports either "foreign official" as an individual or the person's official capacity.[161] However, the statute's description of prohibited conduct bolsters the assertion that the FCPA references the job position, rather than the individual.[162] Furthermore, the statute's title lends support for an expansive reading of "foreign official" in that the acts themselves are foreign, and not necessarily referring to the bribery of a non-U.S. citizen.[163]

Having established ambiguity, a court would read the term in light of the statute as a whole and in the context of the preceding term.[164] When reading within the definition's components, it refers to the "foreign official's" position within the foreign government, rather than the person's foreign nationality.[165] Furthermore, the FCPA's title suggests the broad nature of the statute and emphasizes the "Foreign Corrupt Practice," as opposed to bribery of non-U.S. citizens.[166] However, these arguments are less persuasive when a court looks to "foreign official"—the phrase that generally connotes a person of non-U.S. citizenship.[167] Therefore, a court could not establish with certainty that particular term's definition and would rather look to other canons of construction.[168]

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two preceding words in the definition's series to find it supported both broad and narrow definitions).

160. *See* 15 U.S.C. § 78dd-1(f)(1)(A) (defining the term as "foreign official" without addressing the two words separately).

161. *See id.* (dictating that "foreign official" is "any officer or employee of a foreign government").

162. *See id.* § 78dd-1(a)(1)(A)(i) (prohibiting "influencing any act or decision of such foreign official in his official capacity").

163. *See id.* § 78dd-1 (suggesting a broad reading from the title "Foreign Corrupt Practices" as not referencing specific types of corruption, but rather broad forms).

164. *E.g.*, United States v. Kay, 359 F.3d 738, 742 (5th Cir. 2004) (progressing the inquiry past a declared ambiguous term to read it in light of the other terms and FCPA as a whole).

165. *See* 15 U.S.C. § 78dd-1(f)(1)(A) (reading as "any officer or employee of a foreign government," which suggests that the government position supersedes the actual person).

166. *See generally id.* § 78dd-1.

167. Examining the possible natural meaning of "foreign" could aid in determining the composition of "obtain or retain business." *Cf. Kay*, 359 F.3d at 742–43.

168. *Cf.* United States v. Aguilar, 783 F. Supp. 2d 1108, 1115–17 (C.D. Cal. 2011) (finding that the conflicting definitions and lack of support from other terms and the FCPA could not conclusively establish a concrete meaning and leading the court to try and interpret the meaning through other means).

3. *Other Statutes to Aid in the Interpretation of "Foreign" Fail to Apply to "Foreign Official" and Persuasively Address Citizenship*

Although the *Carson* court looked to the FSIA to aid in the interpretation of "instrumentality," a court would be unable to apply the same logic to "foreign official." Although the FSIA provides clear citizenship requirements under "foreign state,"[169] a court would not use "foreign state" to interpret "foreign official" because the canon of construction that infers meaning from statutory omissions does not apply to a term across two different statutes.[170] The court was reluctant in *Carson* to consider this argument, and a court interpreting "foreign" would likely not find the FSIA persuasive because the FSIA does not define "foreign official."[171]

4. *The* Charming Betsy *Canon of Construction Interprets "Foreign" Expansively to Include Those with U.S. Citizenship*

A court would also interpret "foreign" in light of the U.S. international anti-bribery obligations.[172] *Aguilar* used the canon of construction that the term should be interpreted in light of U.S. international obligations, and a court at first impression would also use that canon of construction.[173] Applying this canon to "foreign," an analysis in light of the OECD Anti-Bribery Convention is persuasive that the term should be read expansively, as was done in *Aguilar*.[174] However, the OECD does not specifically define any terms with reference to specific citizenships.[175] Analysis in light of the U.N. Corruption Convention, the Inter-American Convention against Corruption ("IACAC"), and GRECO are similarly persuasive.[176] Specifically, the U.N. Corruption Convention calls for broad corruption reduction efforts and would support the term to include U.S. citizens under

169. *See* 28 U.S.C. § 1603 (2012) (defining "foreign state" as an agency or instrumentality without U.S. citizenship).

170. *See Aguilar*, 783 F. Supp. 2d at 1116–17 (correcting the defendant's logic that the canon of construction applies to lists of terms within a single statute).

171. *Cf. id.* (declining to make inferences of congressional intent to purposefully exclude a term from a list when comparing two statutes).

172. *See id.* (applying the *Charming Betsy* cannon of construction to "instrumentality").

173. *See, e.g.*, *id.* (broadly reading "foreign official" to conform with the OECD Anti-Bribery Convention, a U.S. international obligation).

174. *Cf. id.* (reading the term to conform to the U.S. international obligations).

175. *See OECD Convention*, *supra* note 38, at 6–8 (urging countries to fight corruption in a broad sense and take steps necessary to eradicate it).

176. *See generally* Inter-American Convention Against Corruption, *supra* note 50 (asking countries to strengthen all anti-corruption efforts); Comm. of Ministers, *supra* note 55 (urging countries to strengthen all anti-corruption measures); United Nations Convention Against Corruption, *supra* note 45 (urging countries to fight corruption at all levels, recognizing the widespread harm that it causes).

"foreign official."[177] A court would not likely consider these binding authority, but rather persuasive texts when looking to the FCPA in light of U.S. international obligations.[178]

When applying the *Charming Betsy* canon of construction, a court would likely find that under the United States' international obligations, a person that meets the requirements of "foreign official" does not have to be a non-U.S. citizen.[179] The international obligations focus less on the actual nationalities and more on the destructive nature of bribery, suggesting the term's interpretation should reduce the bribery where possible and not exclude bribe receivers due to U.S. citizenship.[180] In the event that a court does not apply the OECD Anti-Bribery Convention, according to *Charming Betsy*, a court should look at the other international obligations.[181] The U.N. Bribery Convention would not likely allow this loophole on citizenship as it would be adverse to the rule of law and undermine the efforts to establish it.[182] Congress has not amended the FCPA since the OECD Anti-Bribery Convention, and it may not have changed the FCPA after becoming party to the U.N. Bribery Convention because it viewed terms as sufficient to enforce our international bribery obligations.[183] As such, the FCPA will be enforced as complying with the U.N. Bribery Convention, meaning that "foreign" should be interpreted broadly to encompass non-U.S. citizens.[184]

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177. *See* United Nations Convention Against Corruption, *supra* note 45, at 27–28, 2349 U.N.T.S at 146 (imploring countries to take action to fight corruption on all levels and all types, presumably not supporting a citizenship exception).

178. *See* Inter-American Convention Against Corruption, *supra* note 50, at 8–10, 35 I.L.M 730–31 (asking countries to reduce corruption, while recognizing member state sovereignty in implementing the Convention).

179. *Cf. Aguilar*, 783 F. Supp. 2d at 1116–17 (expanding "foreign official" under the canon of construction to meet international obligations).

180. *See generally OECD Convention*, *supra* note 38 (taking a broad perspective on corruption fighting); United Nations Convention Against Corruption, *supra* note 45 (seeking corruption's eradication); Inter-American Convention Against Corruption, *supra* note 50 (recognizing corruption's destructive nature); Comm. of Ministers, *supra* note 55 (strengthening measures to combat corruption).

181. *See, e.g.*, *Aguilar*, 783 F. Supp. 2d at 1116–17 (applying *Charming Betsy* to interpret "instrumentality" in light of the OECD Anti-Bribery Convention).

182. *See* United Nations Convention Against Corruption, *supra* note 45, at 1–2, 2349 U.N.T.S. at 145 (stressing the establishment and strengthening of the rule of law by eradicating the undermining efforts of corruption and bribery).

183. *See* 15 U.S.C. § 78dd-1 (failing to provide a citizenship requirement after the 1998 Amendment updating "foreign official" to conform with the OECD Anti-Bribery Convention).

184. *See generally* United Nations Convention Against Corruption, *supra* note 45 (requiring parties to take *all* measures possible to eradicate corruption).

5. *A Review of the Legislative History Does Not Specifically Exclude Those with U.S. Citizenship Under "Foreign"*

A court would not find any significant additional means of interpretation in the 1988 or 1998 amendments.[185] A court would also not glean much from the legislative history of the 1977 FCPA.[186] Congress wrote the legislation to encompass foreign transactions, and in doing so, Congress generally implied business in a foreign country.[187] Additionally, the 1977 FCPA focused on what bribery did for the rule of law and democracy, not the terms in general.[188] Therefore, Congress may not have used the word "foreign" to address specifically non-U.S. citizens, but rather in an attempt to focus on the general bribery of foreign governments and their employees as a general category.[189] Without specifically amending "foreign official" to include a citizenship requirement, the legislative history does not conclusively establish one reading.[190]

Additionally, a court could take the approach that *Aguilar* took in deciding how Congress would have seen the facts in the instant case.[191] The *Aguilar* court also looked at "foreign official," and as such, a court would likely adopt the *Aguilar* court's approach and find that Congress would not have wanted the bribe to escape punishment because of a technicality in the language.[192] This means that a court interpreting "foreign" would similarly side with the *Aguilar* court and decide that when the official is a person that would otherwise meet the definition of "foreign official," it should not matter that the person has dual-citizenship.[193]

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185. *See* Georgis, *supra* note 25, at 252–55 (explaining that the amendments addressed foreign public organization and facilitation payments).

186. *See id.* at 248–49 (noting that the 1977 FCPA debates focus strongly on Congress's intent to pass the law in order to protect our reputation overseas in bribing foreign governments).

187. *See id.* at 249–50 (recognizing that Congress intended to address bribery in a non-domestic sense)

188. *See id.* at 250 (stressing the United States' reputation in the global economy and seeing itself as a leader in promoting anti-corruption efforts globally).

189. *See id.* (looking to create the FCPA to address the issue of offering bribes overseas to corruptly obtain business advantages).

190. *See* United States v. Aguilar, 783 F. Supp. 2d at 1108, 1119 (C.D. Cal. 2011). (declining to use the legislative history in the term's analysis, as it was inconclusive on whether or not Congress intended to include state-owned enterprises under "foreign official").

191. *See id.* at 1116–19 (employing a congressional intent analysis after failing to establish from the legislative history that "foreign official" included state-owned enterprises).

192. *Cf. id.* at 1116–17 (illustrating the technicality that arises and gleaning that Congress would avoid such an outcome).

193. *Cf. id.* at 1119–20 (applying the court's proposed hypothetical to "foreign official" to find that a common sense reading was appropriate to interpret

When deciding whether to include the legislative history, a court would decide to review the history like the courts in *Aguilar* and *Kay*.[194] As such, a court would likely review the legislative history, but not give much weight to it.[195] In applying a similar hypothetical to the one the court proposed in *Aguilar*, a court would likely rule that Congress did not intend a dual-citizenship technicality to prevent the prosecution of a bribe, if the person was acting as an official of a foreign government.[196]

6. *An Application of the Rule of Lenity Construes "Foreign" in Favor of the Defendant*

The rule of lenity could compel a court to construe "foreign" in favor of the defendant.[197] The rule of lenity considers that if there are two equally plausible plain language readings of "foreign," a defendant might have fairly assumed that "foreign" implied non-U.S. citizen and acted accordingly.[198] A court might find that "foreign," after employing all other available modes of interpretation, supports two divergent definitions and leaves the court to guess as to what Congress intended.[199] Despite having never applied the rule of lenity to other FCPA terms, a court interpreting "foreign" could find it necessary to employ the rule because the narrow and broad readings are both equally plausible.[200] Therefore, the court could construe "foreign" narrowly as the defendants assert.[201]

"instrumentality").

194. *See id.* at 1116–17 (declining to apply a traditional legislative history interpretation of "instrumentality"); United States v. Kay, 359 F.3d 738, 743–44 (5th Cir. 2004) (deciding that the term "obtain or retain" was ambiguous and the statutory scheme incoherent regarding citizenship, therefore not looking to the legislative history).

195. *See id.* at 1119–20 (declining to look at legislative history); *accord Kay*, 359 F.3d at 749–50 (dismissing a legislative analysis).

196. *Cf. Aguilar*, 783 F. Supp. 2d at 1116–17 (surmising that Congress would not have meant for a language technicality to allow an instance of foreign bribery to go unprosecuted).

197. *See* United States v. Kay, 200 F. Supp. 2d 681, 686–87 (S.D. Tex. 2002) (defining the rule of lenity as construing language in favor of the defendant in instances where one must guess as to what Congress intended).

198. *See id.* (applying the rule of lenity only to instances when the term's meaning is unclear or when the defendant does not have fair warning of its meaning).

199. *Compare* BLACK'S LAW DICTIONARY 719–20 (9th ed. 2009) ("of or relating to another country"), *with* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY 439 (Compact ed. 2011) ("a person or thing from a foreign country"), *and* BARRON'S LAW DICTIONARY 223 (6th ed. 2010) ("belonging to another country or nation").

200. *See generally supra* Section II (arguing and demonstrating that multiple interpretations of "foreign" are equally plausible to a defendant interpreting the FCPA and acting according to its terms).

201. *But cf.* United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 5101701, at *9–10 (C.D. Cal. May 18, 2011) (construing the rule of lenity narrowly as applied to

III. A COURT'S INTERPRETATION OF "FOREIGN OFFICIAL" WOULD LIKELY CREATE A LOOPHOLE BY PROTECTING THE DEFENDANT FROM STATUTORY AMBIGUITY, BUT BUSINESSES SHOULD STRUCTURE COMPLIANCE PROGRAMS THAT TREAT "FOREIGN OFFICIALS" AS INCLUDING THOSE WITH U.S. CITIZENSHIP

A court should read the term "foreign official" expansively to include non-U.S. citizens, as the expansive reading reflects the FCPA's original goal of eradicating foreign bribery and fulfills the United States' international anti-bribery obligations.[202] However, a court could also apply the rule of lenity, creating a loophole and protecting defendants that bribe those "foreign officials" with U.S. citizenship.[203] Ultimately, when creating compliance programs, businesses should reconcile the uncertainty and consider "foreign official" to include those with U.S. citizenship to protect against the FCPA's ambiguity.[204]

A court would likely first declare "foreign official" an ambiguous term and employ a plain language reading and a subsequent reading in light of the surrounding terms, finding that both readings fail to concretely establish a definition due to plausible conflicting meanings.[205] As such, a court would continue its interpretation by consulting the terms of other statutes, but would not persuasively establish a citizenship definition of "foreign official" from the terms of the FSIA or any similar statutes.[206] However, a court reading the term in light of the legislative history and the United States' international obligations would likely establish that "foreign official" should not exclude U.S. citizens.[207]

Despite the reasons that a court should expansively read "foreign official," a court could very well apply the rule of lenity, requiring it to rule in favor of a defendant's argument for a narrow interpretation.[208] The rule's

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"instrumentality" to apply only to instances of true statutory ambiguity).

202. *See* United States v. Aguilar, 783 F. Supp. 2d at 1108, 1116–17 (C.D. Cal. 2011) (applying *Charming Betsy* to interpret "instrumentality" and expand the term in light of the OECD Anti-Bribery Convention's broad notion of corruption).

203. *See Kay*, 200 F. Supp. 2d at 686–87 (defining the rule of lenity as being construed in favor of the defendant in instances where one must guess as to what Congress intended, thereby protecting the defendant and its conduct).

204. *See* Dunn, *supra* note 7 (finding that language clarification would provide greater confidence to bring violations of the FCPA in instances of foreign bribery, thereby enabling better compliance programs).

205. *See supra* Section II.

206. *See id.*

207. *See id.*

208. *See* United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 5101701, at *9–10 (C.D. Cal. May 18, 2011) (withholding from applying the rule of lenity as applied to "instrumentality" because it was not an instance of true statutory ambiguity with two plausible definitions).

application could constrain a court from interpreting the FCPA to capture the few cases that profit from language technicalities and lack of clear definitions in the statute.[209] As such, this rule opens a loophole for defendant businesses to engage in foreign bribery under protection of statutory ambiguity and the rule of lenity.

This loophole creates difficulty for businesses when structuring compliance programs for overseas operations.[210] Without actual knowledge that a court would find both definitions of "foreign" equally plausible and then apply the rule of lenity for the defendant's benefit, businesses lack certainty that the "foreign official's" U.S. citizenship protects its conduct from what otherwise would trigger a FCPA violation.[211] Additionally, a court could possibly withhold the rule of lenity and expansively read the term, finding that the defendant business should have understood that "foreign official" implied any person working in the position's capacity.[212] Without a definitive indication of what a court would do, the loophole's temptation and uncertainty should be treated as effectively nonexistent for purposes of structuring an effective compliance program.

Further adding to the uncertainty, the DOJ and SEC continue to give no indication of whether either agency would bring a FCPA violation, and if so, how they would prosecute it in the event that a business engaged in bribery with a "foreign official" that had U.S. citizenship.[213] Although past actions might indicate that the DOJ is unlikely to bring such a case, businesses cannot safely create compliance programs assuming that the DOJ and SEC have acquiesced to such behavior.[214] The recent DOJ and SEC Prosecution Guide reflect the contrary, and suggest that the agencies will continue to aggressively enforce the FCPA.[215] This could very well include prosecuting instances where the "foreign official" has U.S.

209. *But cf.* United States v. Aguilar, 783 F. Supp. 2d at 1108, 1116–17 (C.D. Cal. 2011).

210. *See* Dunn, *supra* note 7 ("[H]aving the company and the enforcement agency back home agreeing on what those two words mean can be the difference between bribery and compliance.").

211. *See id.*

212. *See generally Carson*, 2011 WL 5101701 (finding that the defendant should have understood instrumentality to encompass state-owned enterprises and therefore not applying the rule of lenity).

213. *See generally* Dep't of Justice Crim. Div. & SEC Enforcement Div., *supra* note 10 (failing to address the citizenship of a "foreign official").

214. *See generally* Cassin, *supra* note 2 (discussing an instance where the DOJ may not have pursued a FCPA violation where the "foreign official" had dual U.S. citizenship).

215. *See generally* Dep't of Justice Crim. Div. & SEC Enforcement Div., *supra* note 10 (noting that the prosecutions would continue at the increased pace).

citizenship, and to effectively avoid enforcement actions, businesses should advise against it in compliance programs.[216]

The FCPA's continued uncertainty hinders business compliance programs. Until Congress fixes the loophole by amending the statute to include a definition of "foreign" to make it clear that "foreign official" may include a person with U.S. citizenship, businesses lack the necessary clarity they need to ensure compliance and should tailor their practices to err on the side of caution.[217]

CONCLUSION

The FCPA prohibits bribes to "foreign officials," but it does not define the word "foreign" or give guidance on what citizenship the official must have.[218] Adding to the difficulty, the recent rise of prosecution and case law fails to produce an obvious answer as to how a court would address the issue and rule on the citizenship of a "foreign official."[219] This presents challenges to businesses when creating effective compliance programs and exposes business to the risks of FCPA violations and less favorable deferred prosecution agreements.[220] However, amidst the confusion, on first impression a court would likely find that a person who meets all of the elements of a "foreign official," but who has U.S. citizenship, would still constitute a "foreign official," given recent court interpretations applied to "foreign." Despite this, in light of the rule of lenity and its recent applications, a court may be compelled to accept a defendant's argument for a narrow reading of the term "foreign."[221] This creates a loophole that further contributes to uncertainty and undermines the FCPA's goals.[222]

Never having reached a court, and lacking direct treatment from an authoritative source, this ambiguity creates uncertainties for businesses

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216. *See* Bixby, *supra* note 36, at 98 (noting how the reach of "foreign official" was expanded to recognize the growth of state-owned enterprises).

217. *See* Dunn, *supra* note 7 (advocating for statutory language clarification to better create compliance programs).

218. *See* 15 U.S.C. § 78dd-1(f)(1)(A) (defining "foreign official" without mention of a citizenship requirement).

219. *See, e.g.*, United States v. Carson, No. SACR 09-00077-JVS, 2011 WL 5101701, at *10 (C.D. Cal. May 18, 2011) (interpreting "instrumentality," relying heavily on a language reading of the term).

220. *See* Dunn, *supra* note 7 (detailing the relationship between favorable treatment from the government in prosecution agreements and non-prosecution agreements for comprehensive compliance programs).

221. *But cf.* United States v. Kay, 200 F. Supp. 2d 681, 686–87 (S.D. Tex. 2002) (defining the rule of lenity as being construed in favor of the defendant in instances where one must speculate on congressional intent).

222. *See generally* Dunn, *supra* note 7 (asserting that the ambiguity can lead to unintentional violations and encourage intentional violations).

conducting operations overseas.[223] The issue is indicative of the growing debate in the United States over expanding the FCPA to include a more modern notion of anti-corruption in commercial transactions and reigning in the FCPA's expansion to return the legislation to its original narrow focus.[224] However, in the midst of this debate, the statute's terms do not reflect the modern realities of a global market place, creating situations that the original statute did not consider.[225] Until statutory reform directly addresses the ambiguity, businesses should err on the side of caution and operate with compliance programs that treat "foreign officials" as including those that meet the FCPA's elements and have U.S. citizenship.

223. *See id.* (arguing for the term's clarification to ensure more predictable enforcement actions).

224. *See* Westbrook, *supra* note 77 (comparing the FCPA to the UK Anti-Bribery Act and arguing that the FCPA could expand to include all commercial bribery).

225. *See, e.g.*, Koehler, *supra* note 58, at 410 (arguing that the application of "foreign official" to state-owned enterprises should be challenged in court for lack of judicial scrutiny).